

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Comcast Cable Communications, LLC on)	
behalf of its subsidiaries and affiliates)	Docket No. 13-134
)	
For Determination of Effective Competition in)	CSR-8797-E
Five Ramsey-Washington Counties Suburban)	
Cable Communications Commission Franchise)	
Areas (Dellwood, Mahtomedi, Maplewood,)	
White Bear and White Bear Lake, MN))	

OPPOSITION TO PETITION FOR SPECIAL RELIEF

Pursuant to 47 C.F.R. § 76.7, Ramsey-Washington Counties Suburban Cable Communications Commission (“RW Cable Commission”), on behalf of the communities of Dellwood, Mahtomedi, Maplewood, White Bear, and White Bear Lake, Minnesota (the foregoing franchise areas being collectively referred to herein as the “Communities”), hereby opposes the petition for special relief (“Petition”) of Comcast Cable Communications, LLC on behalf of its subsidiaries and affiliates (“Comcast”), in the above-captioned proceeding.

RW Cable Commission is a joint powers authority that is responsible for and has been regulating Comcast’s cable rates within the franchise areas on behalf of the Communities. As the relevant regulatory authority, RW Cable Commission opposes Comcast’s Petition on behalf of the Communities.¹

¹ RW Cable Commission previously filed an opposition to another Comcast effective competition petition on behalf of nine Minnesota communities (some of which were withdrawn from consideration by Comcast and are now included in the Petition). *See In the Matter of Comcast Cable Communications, LLC , on behalf of its subsidiaries and affiliates For Determination of Effective Competition in 9 Birchwood Village, MN-Area Franchise Areas, CSR No. 8004-E*, Opposition of the Ramsey-Washington Counties Suburban Cable Communications Commission to Comcast’s Petition for Special Relief, filed Sept. 12, 2008.

I. COMCAST’S PETITION SHOULD BE DENIED OR ACTION ON IT SHOULD BE DEFERRED, AND THE COMMISSION SHOULD CONSIDER SUSPENDING ITS RELATED RULES

Under rules enacted by the Commission, cable systems are presumed not to be subject to effective competition unless and until the Commission makes an affirmative finding that there is effective competition in response to a petition for special relief.² A special relief petition must also meet a public interest criterion: “The petition or complaint shall . . . support a determination that a grant of such relief would serve the public interest.”³ Thus, here, Comcast must show that it is “subject to effective competition” *and* eliminating rate regulation in each of the Communities would serve the public interest. The evidence does not support such Commission findings.

A. DBS DATA OF THE SORT SUBMITTED BY COMCAST CANNOT ALONE CONTINUE TO BE THE BASIS FOR A FINDING OF EFFECTIVE COMPETITION

Comcast alleges that effective competition exists in each of the Communities under the Competing Provider Test. Under this test, Comcast must demonstrate that: (a) each of the local franchise areas for which it seeks relief is served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least fifty percent of the households in the franchise area; and (b) in each such area, the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁴

² 47 C.F.R. §§ 76.7, 76.906 and 76.907.

³ 47 C.F.R. § 76.7(a)(4)(i).

⁴ 47 U.S.C. § 543(L)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

For all the Communities, Comcast relies solely upon DBS penetration data.⁵ For the reasons discussed below, the Commission cannot make credible findings that Comcast is subject to effective competition relying on DBS penetration data alone.

1. The Data Provided By Comcast Cannot Be Presumed to Demonstrate Effective Competition.

The data relied on by Comcast to show that it has satisfied the effective competition test has long been criticized as unreliable. Looking at the *results* of the alleged “effective competition,” as opposed to that data, there is nothing that would suggest that Comcast is subject to effective competition in those Communities, as compared to communities that are not subject to effective competition in the same area, including the City of St. Paul. Indeed, the limited basic service rates offered by Comcast are significantly higher in the Communities than in the City of St. Paul.⁶ If competition from DBS were actually effective in the Communities, one would expect to see the opposite result, that is, lower rates in the Communities. What is more, nationally the Commission has confirmed that what is true in the Communities is true elsewhere: the FCC reports that when it compares rates in communities that it has determined are subject to effective competition where the competitor is a DBS system to rates where the competitor is a wireline system, the incumbent’s rates are higher where the competitor is DBS.⁷

It follows that one of two things is true: either (a) the tests that the Commission has relied upon to determine whether penetration and availability satisfy the 50/15 threshold are not reliable (e.g.: the assumptions that DBS offers “comparable video programming”; that this programming is in fact “offered” to at least 50% of the households in an area; and that the data

⁵ Petition at 7.

⁶ See the attached Declaration of Timothy W. Finnerty.

⁷ See discussion *infra* at FN 24.

relied upon by cable operators can be relied upon as a measure of penetration); or (b) the standard itself is flawed.

To take “comparable video programming” as an example, the Commission basically *presumes* that DBS video programming services are comparable to cable. But PEG access channels are offered as part of basic service in the Communities; the channels are quite active; and there is nothing comparable offered by satellite providers. In fact there are 18 local channels offered on the Comcast system in this area that are not offered on the DBS systems.⁸ In addition, wireline providers are now broadly offering “multi-platform” video programming services (which include delivery of video programming via broadband platforms) that DBS providers admit that they cannot match.⁹

In the clear absence of any price constraints, and in the clear presence of differences in the video programming offered by the providers, the Commission should conclude that the Communities are *not* subject to effective competition, and reject the petition filed by Comcast.

2. The FCC May Protect Communities Even If One Presumes That the Effective Competition Test in Section 623(l) Is Satisfied.

In establishing several effective competition tests or showings, Congress and the Commission relied on an essential relationship between competition and rates. Congress used the “effective competition” criterion because Congress assumed such competition would hold rates to reasonable levels via market pressures (and for similar reasons protect consumers in other respects), making rate regulation unnecessary.¹⁰

⁸ For the complete list, see the attached Declaration of Timothy W. Finnerty.

⁹ See discussion *infra* at 8.

¹⁰ See, e.g., S. Rep. 102-92 at 11-12, *reprinted at* 1992 U.S.C.C.A.N. 1133, 1144 (1991).

In 1992, when Congress established the statutory framework for the effective competition tests that included the Competing Provider Test, it directed the Commission to issue implementing regulations.¹¹ The Commission's First Order described the tasks as follows:

Our tasks in this proceeding are to: 1) develop a process for identifying those situations where effective competition exists (and rate regulation is thus precluded), 2) establish the boundaries between local and state, and federal responsibilities, 3) develop procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) create a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.¹²

In its Order, the Commission recognized that the Cable Television Consumer Protection and Competition Act of 1992 was attempting to rectify a problem that the Cable Communications Policy Act of 1984 had left for consumers – monopoly cable rates.¹³ The Commission established a definition of MVPD associated with the tests based (in part) on the definition of MVPD in the statute.¹⁴ The Commission's MVPD definition – established in 1993 – was broader in scope:

A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service

¹¹ 47 U.S.C. § 543.

¹² *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation* 8 FCC Rcd 5631, 5637 (FCC 1993)

¹³ *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5638-5639 (FCC 1993) (“The 1984 Act, however, generally was not successful in creating a competitive multichannel video distribution marketplace as cable systems continued to develop without direct multichannel video competitors. Thus, consumers were left without the protections with respect to cable rates and customer service that they would have had in a more competitive environment. The challenge presented by this situation was how to preserve and extend the benefits of increased investment, programming diversity, and technical innovation that cable provides while protecting subscribers from noncompetitive rate levels. It is this balance that the 1992 Cable Act seeks to strike.”)

¹⁴ 47 U.S.C. § 522(13).

provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.¹⁵

The definition included DBS (as did the definition of “multichannel video programming distributor” added to the Communications Act in 1992) even though at the time of the Commission’s order, there was no DBS competition.¹⁶ It was anticipated by Congress and the Commission that DBS would provide effective competition. In fact, the Commission was so certain in this respect that the rules it adopted for deciding whether DBS offers comparable video programming; and whether that programming is offered throughout 50% of a community; and how the 15% would be determined; that it almost treated these factors cavalierly. In effect, the Commission assumed that DBS *would* provide effective competition to cable, and constrain prices. However, that predictive judgment quickly turned out to be wrong.

Years of information make it clear that DBS competition is insufficient to curb the market power of a wireline cable operator. For example:

- In 1996, just a few years after the Commission rules were issued, Congress established additional rules to encourage local exchange carriers (LECs) to compete in the video marketplace and established a “LEC Test” for effective competition which explicitly excluded satellite, permitting consideration of video services provided directly to subscribers “by any means (other than direct-to-home satellite services)...”¹⁷
- The Commission’s 1999 order establishing implementing regulations for the LEC Test quoted extensively from the numerous statements in Congress expressing the expectation that wireline telephone companies would offer robust competition to cable companies, and adopted a “substantial overlap” requirement for LEC systems to ensure that cable markets are not deregulated before they are truly competitive.¹⁸

¹⁵ 47 C.F.R. § 76.905(d).

¹⁶ *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5660 (FCC 1993) (“Currently, no ‘competitive’ DBS system is operational.”)

¹⁷ 47 U.S.C. § 543(L)(1)(d) and 47 C.F.R. § 76.905(b)(4).

¹⁸ *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, 14 FCC Rcd 5296, 5302-5304 (F.C.C. Mar. 29, 1999)(The Commission

- In reports issued in 2002, 2003 and 2004, the General Accounting Office (“GAO”) found that satellite providers alone have at most a minuscule effect on cable rates.¹⁹
- In 2002, the Commission made the same point about DBS as the GAO had made.²⁰
- In its 2007 order imposing new federal regulations on the cable franchising process, the Commission took action based on an imperative need for *wireline* competition to incumbent cable operators. The Commission stated that “[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS” and indicated that wireline competitors, not DBS, bring down rates.²¹ In particular, statements accompanying the Local Franchising Order indicated the belief that DBS competition is not sufficient to prevent cable operators from charging unreasonable rates.²²
- Every one of the Commission’s price surveys from 2009 to date have reported the **average prices are higher** in “effective competition” communities than in communities without effective competition.²³ For example, the most recent report indicates the average price for expanded basic service is \$62.49 in effective

summarized that “[t]he thrust of the 1996 Act is Congress’ expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and, as Cablevision points out, their ubiquitous presence in the market.”)(citations omitted).

¹⁹ See United States General Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO 04-241 (February 2004); *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, GAO-04-8 (Oct. 24, 2003); *Telecommunications: Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO-03-130 (Oct. 15, 2002).

²⁰ *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 17 FCC Rcd. 6301 at ¶ 45 (2002) (“the presence of effective competition due to DBS overbuild status has no significant effect on cable rates.”).

²¹ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd 5101 at ¶ 50 (March 5, 2007) (“Local Franchising Order”). See also *id.* at ¶ 19 (“Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service. . . . In the vast majority of communities, cable competition simply does not exist”); ¶ 35 (analyzing the new entrant as the “second provider,” without counting DBS companies as competing providers).

²² See, e.g., Statement of Commission Chairman Martin on Local Franchising Order, ¶ 3 (“competition is desperately needed” because of excessive increases in cable rates).

²³ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices (rel. June 7, 2013) at ¶ 4, FN 7 (Cable Prices Report).

competition communities vs. \$60.99 in noncompetitive communities.²⁴ The Commission itself has recognized that the price difference is statistically significant.²⁵

- Those “effective competition” communities where the Commission’s effective competition findings relied solely on DBS suffer *the highest prices* of all subgroups of communities. The average price of expanded basic service in those communities is now \$62.76, or 0.4% higher than the average price of \$62.49 for effective competition communities overall.²⁶ Thus, subscribers in this specific subgroup pay on average 2.9% more for expanded basic service than communities without effective competition.²⁷

Recent market trends suggest that DBS will only become *less* effective as a competitor to the incumbent cable operator. The largest DBS provider, DirecTV, recently cautioned that due to trends in bundling, and multi-platform video programming delivery, the “video only market” no longer captures competitive challenges, broadband is becoming the “anchor” product of the wireline MVPDs, and DBS providers have difficulty competing with service bundles that include broadband.²⁸ One course, as suggested above, is for the Commission to decide that DBS no longer satisfies the effective competition test under the Cable Act, *inter alia* because it has not in fact offered, and certainly no longer offers “comparable video programming.”

But even if the Commission does not go that route, it may protect the public. The Commission has a duty to act in the public interest.²⁹ It also has an obligation to engage in

²⁴ Cable Prices Report at ¶ 3.

²⁵ Cable Prices Report at ¶¶ 3-4.

²⁶ Cable Prices Report at ¶ 5. By contrast, in communities where there is a rival wireline operator, both the incumbent’s rates and the rival operator’s rates are *lower* than that average. *Id.*

²⁷ Percentage difference between \$62.76 and \$60.99.

²⁸ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, DirecTV Comments (filed Sept. 10, 2012) at ii, 3-4, 13-14, 15-18.

²⁹ 47 C.F.R. § 76.7(a)(4)(i).

reasoned decision making.³⁰ As discussed above, there is significant evidence, publicly accepted by the Commission, that DBS does not provide effective competition for cable operators and that the 1993 rules in effect adopting DBS as a measure of effective competition are not working as predicted – in fact, the results directly *contradict* what Congress and the Commission expected. Effective competition findings based on DBS alone demonstrably harm consumers, exposing them to cable companies’ market power in instances where competition is not actually effective at keeping rates reasonable.³¹ The Commission has an obligation not to ignore these facts – it must cease to apply the rules in an unreasoned manner that harms the public interest. It must deny the Petition, or defer action on it, and consider suspending its related rules until such time as they can be modified to serve the cable rate policy goals for which they were enacted.

3. The Commission Has the Discretion to Take This Action

The statute expressly requires the Commission to find not only that 47 U.S.C. § 543(l)(1)(B)’s “effective competition” definition is satisfied, but also that the cable system is “subject to” it.³² “[T]he words ‘subject to’ leave room for interpretation.” *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 547 (D.C. Cir. 2002); *see also Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 833 (9th Cir. 1996) (“The meaning of ‘subject to’ includes, among other things, ‘governed or affected by.’”); *In re Jackson*, 348 B.R. 487, 497-498 (Bankr. S.D. Iowa 2006) (finding that “the term ‘subject to’ means ‘determined by something else’ as in ‘dependent’ or ‘being in a situation where one is likely to meet with harm’ as in ‘liable.’”).

³⁰ *See Cellnet Commc’ns v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (“If the FCC’s predictions about the level of competition do not materialize, then it will of course need to reconsider its sunset provisions in accordance with its continuing obligation to practice reasoned decision making.”).

³¹ *See* discussion in II.A.1. *supra*.

³² 47 U.S.C. § 543(a)(2) states: “If the Commission finds that a cable system is *subject to* effective competition, the rates for the provision of cable service by such system shall not be subject to regulation.”

Here, Commission has the discretion to conclude that, based solely on the presence of DBS providers, Comcast is not “subject to” effective competition. A cable system is not “subject to” *effective competition* if the existence of “effective competition” does not influence the system’s behavior. As discussed earlier, the Commission’s own data show precisely that—the presence of DBS does not affect the incumbent cable operator’s pricing behavior. And, as noted above, there is no evidence in the record to suggest that Comcast’s pricing behavior is any different in the Communities than anywhere any incumbent cable operator faces competition from DBS. Thus it is reasonable for the Commission to assume that Comcast, the largest cable operator in the industry, is equally unaffected by DBS competition in the Communities. And in fact, Comcast’s pricing behavior in the Communities has been unaffected by DBS – Comcast’s prices have risen steadily for at least a decade.³³

II. THE COMMISSION HAS PRECEDENT FOR SUCH ACTION

The evidence discussed above demonstrates the need for the Commission to deny the Petition, or alternatively defer action on, and to consider suspending its rules that permit a cable operator to rely solely on DBS penetration to escape rate regulation. There is also recent precedent for taking such actions. The Commission has authority to suspend rules on its own motion.³⁴ In August of last year, the Commission suspended, on its own motion, certain rules that had permitted price cap LECs to obtain deregulation orders as competition for special access services increased.³⁵ The Commission suspended the rules for the simple reason that the proxies for competitive showings that the Commission adopted in 1999 turned out, based on extensive

³³ See the attached Declaration of Timothy W. Finnerty.

³⁴ 47 C.F.R. § 1.3.

³⁵ *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services* (WC Docket No. 05-25, RM-10593) Report and Order, (rel. Aug. 22, 2012).

experience, “not to be accurate indicator[s] of competitive pressure sufficient to constrain prices throughout that area.”³⁶ Nor is this the only instance in which the Commission has changed its competition policy when real world market developments called into question earlier predictions. The Commission has also modified its competition policy in the context of considering (and denying) a local exchange carrier’s regulatory forbearance application, an application procedure not unlike the effective competition petition procedure in this proceeding.³⁷

As DBS penetration – or the manner in which the Commission determines effective competition – has not proven to be an accurate indicator of competitive pressure sufficient to constrain prices in cable franchise areas, it would be consistent with the weight of the evidence, Congressional intent, the public interest, and reasoned decision making for the Commission to adjust its effective competition policy in light of market realities.

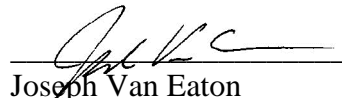
³⁶ *Id.* at ¶ 4, *see also* ¶¶ 22-75.

³⁷ *See for example, Qwest Corp. v. F.C.C.*, 689 F.3d 1214 (10th Cir. 2012) where the Court upheld a Commission decision on a forbearance application that involved a change in Commission policy. The Court stated: “Taking these factors together—specifically, the well-documented anti-competitive risks of duopoly, the subsequent developments in Omaha, and the lack of effective competition in the Phoenix market—the Commission could rationally call into question its earlier predictions, perceive the need for a different approach, and proceed cautiously regarding the possibility of granting forbearance in the Phoenix MSA, given the real-world understanding that doing so might result in a Qwest-Cox duopoly similar to the one in Omaha. Based upon the foregoing reasoning, we reject Qwest’s contention that the *Phoenix Order* is unreasonable.”

III. CONCLUSION

For the reasons discussed above, RW Cable Commission respectfully requests that the Commission deny Comcast's Petition, or alternatively defer final action on it, and suspend its related rules, until such time as the rules can be modified to better serve the goal of Congress to ensure effective competition in the video marketplace.

Respectfully submitted,



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June 10, 2013

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Suburban Cable Communications Commission*

**Before the
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DECLARATION OF TIMOTHY W. FINNERTY

I, Timothy W. Finnerty, declare, under penalty of perjury that:

1. I am the Executive Director of the Ramsey-Washington Suburban Cable Communications Commission and have served in this position since 1992.
2. I have read the foregoing Opposition to Petition for Special Relief (“Opposition”) and am familiar with the contents thereof and the matters referred to therein.
3. The Ramsey-Washington Suburban Cable Communications Commission is a joint powers authority that that has been given certain authority by its member municipalities, including authority with respect to rate regulation. Under this authority, it is responsible for and has been regulating Comcast’s cable rates within the communities of Dellwood, Mahtomedi, Maplewood, White Bear, and White Bear Lake, Minnesota, among others.
4. The Commission is responsible for and has been regulating Comcast’s cable rates within the communities of Dellwood, Mahtomedi, Maplewood, White Bear, and White Bear Lake, Minnesota, among others.
5. To the best of my knowledge, information, and belief Comcast’s cable prices in the

communities of Dellwood, Mahtomedi, Maplewood, White Bear, and White Bear Lake, Minnesota have risen every year since 1992.

6. Today, I searched Comcast's website for the rates for a zip code in St. Paul, a community that I understand is not subject to an effective competition finding by the Federal Communications Commission, and a zip code in White Bear Lake, one of the communities which Comcast claims is subject to effective competition. The results of the rate searches are attached to this declaration as Exhibit A. The results show that Comcast offers residents of White Bear Lake Limited Basic service for \$16.40 per month, and offers residents of St. Paul the same Limited Basic service for only \$11.18 per month.

7. The programming offered on Comcast's system serving the Communities differs significantly from that offered by the DirecTV and Dish Networks, in particular with respect to the availability of local programming. The following local programming channels, including PEG channels, are offered on Comcast's system but are not offered by either of the satellite providers:

Metro Regional Channel 6

SCC Religious Access Channel 14

SCC Public Access Channel 15

Ramsey/Washington Area Government Access Channel 16

Ramsey/Washington Area Programming Channel 18

On Location TV Channel 19

School District Channel 20

Local Access Programming Channel 95

Local Higher Ed Access Channel 98

WUMN Channel 13 (low power analog)

KTCA TPT-Minnesota Channel 2.2

KTCA TPT-Weather Channel 2.4

KSTC MeTV Channel 5.3

KSTC Antenna TV Channel 5.4

KSTC This TV Channel 5.6

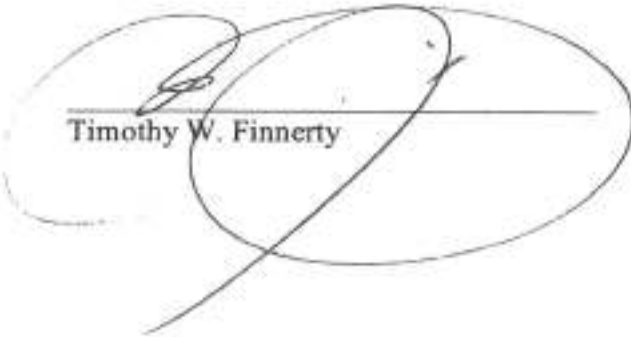
KARE WeatherNOW 11.2

WUCW TCN Channel 23.3

K16HY-LD Channel 16 (digital)


I declare under penalty of perjury that the foregoing is true and correct.

Date: June 10, 2013



Timothy W. Finnerty

EXHIBIT A



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CERTIFICATE OF SERVICE

I, Willette Hill, do hereby certify that on this 10th day of June, 2013, in addition to filing the foregoing **OPPOSITION TO PETITION FOR SPECIAL RELIEF** using the FCC's electronic filing system, a true and correct copy of the foregoing has also been sent via U.S. mail, postage prepaid to the following:

Wesley R. Heppler
Steven J. Horvitz
Frederick W. Giroux
Davis Wright Tremaine
1919 Pennsylvania Avenue N.W., Suite 800
Washington, DC 20006

/s/ Willette Hill
Willette Hill

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